UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	**Crim. No. 94-11-B**
	)	
GEORGE H. BENNETT,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255

George H. Bennett moves the Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1994 & Supp. 1997). Bennett was convicted in August of 1994 of conspiracy to possess marijuana with intent to distribute, 21 U.S.C. § 846 (Pamph. 1997); carrying or using a firearm during and in relation to a drug trafficking offense, 18 U.S.C. § 924(c)(1) (Pamph. 1997); and unlawful possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1) (Pamph. 1997). He was sentenced to a term of 360 months' imprisonment. He now challenges the latter two of the above convictions, contending that there is insufficient evidence to support them; that the Court erred in instructing the jury; that he received ineffective assistance of counsel at various stages of the proceedings; and that his sentence reflects an unwarranted disparity among similarly situated defendants.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (internal quotation and citation omitted). Because I find that Bennett's allegations,

accepted as true, do not entitle him to relief, I recommend that his motion be denied without an evidentiary hearing.

I. Background

As the United States Court of Appeals for the First Circuit noted on direct appeal of this matter:

> [O]n the day of the mistaken raid, Bennett, [Lionel] Lussier, and [Gary] King, along with two other friends, drank and discussed seeking revenge for a previous attack in which mutual friend Ronald Madore, a small-time marijuana dealer, was beaten and robbed of marijuana, money, and guns. The group continued their drinking and their discussion that evening at Madore's house.
>
> Madore testified that Bennett, Lussier, and King planned to beat up the man Madore suspected was behind the previous attack, one Wayne Hathorne, take any marijuana he had (along with any money) and give the marijuana to Madore so he could sell it and share the proceeds. King's testimony regarding the plan was less definitive; he stated at one point that they only intended to beat Hathorne, but elsewhere that both discussed stealing Hathorne's marijuana and giving it to Madore because "[h]e deals in it."
>
> It is undisputed that shortly after this conversation the four men--the appellants [Bennett and Lussier], Madore and King--left Madore's house in Bennett's car and drove to a trailer home which they mistakenly believed was Hathorne's. While Madore waited in the car, Bennett, Lussier and King entered the trailer and terrorized occupants David Wing, Michelle Morin and their children, physically assaulting Wing and Morin while a gun was held to Wing's head. There was testimony, . . . that all four men knew of the proposal to bring a gun and that first King and then Lussier carried the weapon.
>
> Wing testified that during the attack all three men were shouting "[w]here is our dope?"; Morin heard them shouting about drugs but did not specify whether it was particular individuals or all of them. Wing and Morin, who had no drugs, tried to convince their assailants they had the wrong house. These pleas were met with a threat to kill Wing. In an ensuing struggle for the gun Wing was shot through the finger. Bennett, Lussier and King immediately fled the scene without taking anything.

United States v. Bennett, 75 F.3d 40, 44-45 (1st Cir.), *cert. denied*, 117 S.Ct. 130 (1996).

Following his conviction as a result of the jury's guilty verdict, Bennett was sentenced by the Court on November 18, 1994, to a term of 300 months' imprisonment on the felon-in-possession charge, and to a term of sixty months' imprisonment for carrying a firearm during the drug crime, for a total sentence of 360 months' imprisonment. The judgment was entered on the docket on November 22, 1994. Bennett appealed both his convictions and his sentence. *Id.* at 44. The First Circuit affirmed both the convictions and the sentence. *Id.* at 49. Bennett's current motion[1] was timely filed on April 9, 1997.

II. Discussion

A. Sufficiency of the evidence at trial

Bennett contends that there was no evidence presented at the trial that he possessed, carried or used a firearm during the conspiracy to obtain drugs from Hathorne, or that he possessed a firearm as a convicted felon. In view of the fact that the First Circuit considered and rejected these same arguments on Bennett's direct appeal, finding that sufficient evidence existed to affirm his convictions, *id.* at 45, this claim should be dismissed. It is well settled that "[i]ssues resolved by a prior appeal will not be reviewed again by way of a 28 U.S.C. § 2255 motion." *Murchu v. United States*, 926 F.2d 50, 55 (1st Cir.), *cert. denied*, 502 U.S. 828 (1991) (quotations and citations omitted). Bennett cannot now review the claim on collateral attack.

B. Jury instructions

Bennett also contends that the Court erred in its instruction to the jury concerning the aiding and abetting charge. In both firearms counts, the government charged Bennett and his co-

[1] Like the government, the Court considers Bennett's supplemental "traverse" brief filed on July 28, 1997, to be an amended motion, and has fully considered the issues raised therein in issuing its Recommended Decision.

conspirator, Lussier, as principals and as aiders and abettors pursuant to 18 U.S.C. § 2 (1969). Bennett claims that the instruction given by the Court allowed the jury to convict him without the required scienter. Like his above claim regarding the sufficiency of the evidence, however, this claim was fully litigated on direct appeal and rejected by the First Circuit, which found that "[i]f there was an ambiguity in the instruction, it did not affect the result." *Bennett*, 75 F.3d at 48. Accordingly, Bennett may not seek review of this claim again by way of his section 2255 motion. *Murchu*, 926 F.2d at 55.

C. Ineffective assistance of counsel

Bennett makes a variety of claims related to ineffective assistance of counsel at various stages of the proceedings. Bennett contends that his lawyer's performance was deficient and his case prejudiced because his lawyer failed: (1) to investigate custom manufacturers of handguns in Maine; (2) to request a jury instruction based on a justification defense; (3) to file appropriate objections to the presentence investigation report; (4) to present more evidence at sentencing to support a downward adjustment in his offense level; (5) to provide the Court with a factual and legal basis for Bennett's acceptance of responsibility; and (6) to handle his case well on direct appeal. Because these bases for relief are conclusory, refuted by the record, or otherwise do not justify relief, the claims may be denied without a hearing.

"To establish a Sixth Amendment violation, [] [a petitioner] has to show that his lawyer's performance 'fell below an objective standard of reasonableness,' and that prejudice resulted because, absent the mistake or mistakes, there is a reasonable probability that the outcome would have been different." *United States v. Alston*, 112 F.3d 32, 36-37 (1st Cir. 1997) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-688, 691-692 (1984)). Ineffective assistance of

counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland*. Specifically, a petitioner must show the Court that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. The petitioner also must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id*. There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id*. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

1. Failure to investigate custom manufacturers of handguns in Maine

Bennett contends that his attorney was deficient in failing to investigate custom manufacturers of handguns in Maine. He maintains that the Ruger handgun at issue in the underlying case was manufactured in Maine, and therefore did not travel in interstate commerce. This claim is conclusory and unsubstantiated, however. Bennett fails, for example, to make a showing as to what evidence of Maine manufacture his lawyer could have obtained and presented at the trial. Nor does he claim that the gun fired at Wing was not a Ruger as found by the jury. Indeed, in affirming the judgment entered by the trial court, the First Circuit noted the "overwhelming probability" that the gun involved in the underlying matter was not manufactured in Maine but, instead, traveled in interstate commerce. *Bennett*, 75 F.3d at 45. Bennett offers very little to challenge this finding. Without more of a factual showing as to what evidence his

lawyer could have obtained through a pretrial investigation, there is virtually no basis to support Bennett's conclusory claim. *Dziurgot*, 897 F.2d at 1225.

2. Failure to request a jury instruction based on a justification defense

Bennett also contends that his attorney should have sought from the Court a jury instruction based on a justification defense. A justification defense in a felon-in-possession case requires proof that: (1) the defendant was under an unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative; and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *United States v. Gomez*, 92 F.3d 770, 775 (9th Cir. 1996); *see also United States v. Meade*, 110 F.3d 190, 202 & n.26 (1st Cir. 1997) (citing favorably *Gomez*).

This contention is unavailing because neither Bennett nor the record establish that the above elements exist in this case to support the giving of such an instruction. *United States v. Flores*, 968 F.2d 1366, 1367 (1st Cir. 1992) (defendant has right to an instruction only if theory supported by record). Bennett has not made any factual allegation that he was under a threat or that he did anything other than engage willfully in criminal activity. Considering the facts of the case, Bennett's attorney was under no obligation to seek an instruction based on the defense of justification. *Isabel v. United States*, 980 F.2d 60, 65 (1st Cir. 1992) (counsel need not make arguments that are not "plausible options").

3. Failure to file an appropriate objection to the presentence investigation report

Bennett further maintains that his attorney should have made, in addition to the twenty-five others he registered, an objection to the presentence investigation report based on his armed career criminal status. Bennett avers that two of the five criminal convictions supporting his classification as an armed career criminal for sentencing purposes arose on the same occasion and, thus, should not have been counted as *two* but rather *one* prior felony conviction.

Even if Bennett's allegation is true, it does not entitle him to relief. Although the record does, indeed, reflect that he likely has only four, not five, prior convictions,[2] no prejudice resulted from his lawyer's failure to make the objection because the Armed Career Criminal Act of 1984 requires only *three* convictions for a defendant to be considered as an armed career criminal. 18 U.S.C. § 924(e) (Pamph. 1997). Having the requisite three prior felony convictions (dated May 14, 1978; January 20, 1979; and June 2, 1985) for application of the Act's provisions, it is clear that Bennett was not prejudiced by his lawyer's performance with respect to this contention. *Strickland*, 466 U.S. at 694.

4. Failure to present more evidence at sentencing to support a downward adjustment in Bennett's offense level

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[2] Bennett was convicted of aggravated assault and criminal threatening as a result of his conduct on the night of January 20, 1979, when he broke into the home of Terri Moore and Kevin Bamford. The presentence investigation report in the underlying matter stated that Bennett has five prior felony convictions, but the two above crimes did not arise on "occasions different from one another," 18 U.S.C. § 924(e) (Pamph. 1997), and, thus, may be said to count only *once* when calculating the number of prior crimes of violence for purposes of the Armed Career Criminal Act of 1984. *See also United States v. Petty*, 828 F.2d 2, 3 (8th Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988) (conviction of six counts of armed robbery stemming from single incident counted as one conviction for purposes of enhanced sentencing statute).

Although the presentence investigation report recommended, and the Court gave, no adjustment for Bennett's role in the underlying offenses, Bennett nonetheless asserts that his lawyer should have sought an adjustment because he was a "minor participant" in the conspiracy for purposes of U.S.S.G. § 3B1.2(b), and because he accepted responsibility for his conduct. At sentencing, Bennett's attorney did seek a four-level reduction for Bennett, claiming that he was a "minimal participant" under U.S.S.G. § 3B1.2(a). The Court rejected this argument, however, finding that Bennett "relieve[d] himself of any possibility of being a minimal participant . . . under the guidelines" when, among other things, Bennett held down the victim, Wing, at his home. In view of the Court's ruling at sentencing on this issue, it thus appears that it would have been futile for Bennett's attorney to continue to press for a downward adjustment based on the argument that he was a minor participant. *United States v. Wright*, 573 F.2d 681, 684 (1st Cir.), *cert. denied*, 436 U.S. 949 (1978) (counsel under no obligation to press futile issues). Even if the issue were not futile, Bennett's counsel's decision may be viewed as a strategic one that the Court will not second-guess. *Strickland*, 466 U.S. at 687.

Similarly, Bennett's contention based on acceptance of responsibility is without merit. Bennett's lawyer argued for such credit at sentencing, despite the fact that the presentence investigation report concludes that Bennett "has not accepted responsibility for his involvement in the instant offense, ..." The "extracts" from the record that Bennett claims his lawyer should have presented to the Court with respect to this contention are the transcribed statements he made in front of the Court. The issue thus was already before the Court. As the First Circuit has noted, when, as here, the evidence at trial shows that issues of a defendant's intent and role in a crime are in factual dispute, the availability of a downward adjustment for acceptance of responsibility

is jeopardized. *United States v. Crass*, 50 F.3d 81, 84 (1st Cir. 1995). It is, then, quite evident that these statements need not have been resubmitted by Bennett's attorney, and they almost certainly would not have changed the outcome of the sentencing proceeding. *Wright*, 573 F.2d at 684.

5. Failures related to the direct appeal

Bennett contends that his lawyer was deficient on his direct appeal with respect to "unprofessional legal arguments, lack of case law citations and sheer laziness." Such a "bare statement," void of any specific factual allegation or other support in the record, is conclusory and cannot succeed through this motion. *See United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd. on other grounds, United States v. LaBonte*, 117 S.Ct. 1673 (1997); *Dziurgot*, 897 F.2d at 1225. Absent more detail, the claim should be dismissed without an evidentiary hearing.

D. Disparity in sentencing

Finally, Bennett contends that his sentence represents an unwarranted disparity "among defendants with similar records who have been found guilty of similar criminal conduct" pursuant to 28 U.S.C. § 991(b)(1)(B) (1993). Notwithstanding the fact that the Sentencing Guidelines are not designed necessarily to avoid the disparity among sentences in a particular case, *see United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir.), *cert. denied*, 502 U.S. 969 (1991), Bennett utterly has failed to illustrate by comparison through facts or any evidence the discrepancies between his and the other co-defendants' criminal records in this case. By failing to do so, he has not demonstrated that his record is sufficiently similar to those of the others involved in the underlying facts and, thus, his claim cannot succeed. Accordingly, I recommend

that this claim be dismissed without a hearing, as well.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu
United States Magistrate Judge

Dated this 13th day of November, 1997.